Supreme Court, U.S.
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No. 01-1989

In the
Supreme Court of the United States

PETER W. HUNT
PETITIONER

v.

UNITED STATES ARMY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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71 pp

QUESTIONS PRESENTED

1. Does a preference eligible veteran who is a current federal employee have the right to seek administrative and judicial redress when a federal agency denies him consideration required by 5 U.S.C. 3304(f) and other veterans' preference requirements?

2. Was the District Court and the Sixth Circuit Court of Appeals correct in their interpretation of congressional intent by holding and affirming that the language of 'statute or regulation relating to veterans' preference' contained within 5 USC 3330a has the same meaning as the language 'veterans' preference requirement' within 5 USC 2302(b)(11)(B) thus restricting redress to allegations of violations of "veterans' preference requirements" even thought 5 U.S.C. 3330a has a potentially broader scope of statutes and regulations?

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In the Supreme Court of the United States

Peter W. Hunt, PETITIONER

v.

UNITED STATES ARMY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Peter W. Hunt petitions for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

Opinion Below

The opinion of the District Court in Hunt v. United States Army together with the opinions of the Sixth Circuit Court of Appeals and its denial of rehearing are included in Appendix A. The Federal Circuit Court of Appeals decision in Hunt v Office of Personnel Management is included in Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on March 7, 2002. A petition for rehearing was denied on May 7, 2002. On August 7, 2002, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including October 4, 2002. On October 9, 2002 the clerk of the court returned the petitioner's timely filed writ of certiorari for correction. The jurisdiction of this Court is involved under 28 U.S.C. § 1254 (1).

Statutory Provision Involved

The Veterans Employment Opportunity Act of 1998 (VEOA) and related statutes are reproduced in Appendix C.

Statement

Petitioner has been employed by the United States Army as a procurement specialist since September 24, 1980. He has been employed by the respondent, first as Price Analyst then as a Procurement Analyst. The petitioner was promoted only twice during his twenty-two year civilian career -- once in 1981 then again in 1983. Since 1983, despite his best efforts and qualifications, he has failed to advance and in some cases has been denied consideration for advancement. The petitioner's career field requires mandatory training courses to be eligible for promotions. These courses could be taken or waived by management. The petitioner was denied the opportunity to take the training due to management decisions that his duties would not allow for his absence and management failed to grant any training waivers.

The Defense Acquisition Workforce Improvement Act of 1990 PL 101-510 (10 U.S.C. § 1724) (DAWIA) as amended by PL 106-398 was enacted to improve the level of formal education required of the acquisition workforce. The petitioner met the formal educational requirements contained within 10 U.S.C. § 1724 as amended by PL 106-398 before his initial appointment into the competitive service. Many of petitioner's peers who successfully competed for promotions denied the petitioner did not and do not meet the educational requirements of 10 U.S.C. § 1724.

During the petitioner's career, he was assigned some of the most difficult and highly visible procurement actions. Management informed the petitioner that his military experience was a key factor for such assignments. The petitioner constantly received excellent performance ratings, received numerous awards and commendation for his service and was never, to the best of the petitioner's knowledge, ever considered for any form of disciplinary action, yet when competing for advancement he was unsuccessful. Most, if not the all, selection officials are not veterans despite their being of draft eligible age during Vietnam.

On numerous occasions, management officials informally questioned the petitioner about his experience in Vietnam and what he had done to try to avoid service in Vietnam. An informal analysis done by the petitioner revealed that very often those veterans who actually served in Vietnam were not allowed to compete for, or when allowed to compete were not selected for,

advancement. The Uniformed Services Employment and Reemployment Rights Act of 1994 (codified as amended at 38 U.S.C. § 4301-4333 (1994 & Supp II 1996)) (USERRA) prohibits discrimination against persons because of their service in the uniformed services and is applicable to all employers, including governmental. The Federal Government should be a model employer in carrying out the provisions of USERRA (38 U.S.C. § 4301(b)). The Federal Circuit Court of Appeals held in *Sheehan v. Department of the Navy*, 240 F.3d 1009 (Fed. Cir. 2001) that "an employee making a USERRA claim of discrimination ... bear[s] the initial burden of showing by a preponderance of the evidence that the employee's military service was a 'substantial or motivating factor' in the adverse employment action" which established the requirement that to be successful under USERRA a veteran must have access to internal information which supports their allegations that their service was a 'substantial or motivating factor". Showing that the acting official was biased against veterans is not admissible to support the veteran's allegations. This same standard of evidence is not required in a VEOA complaint since VEOA deals with a denial of a preference, not an act of discrimination.

The Army notified the petitioner by letter dated April 1, 1999 of his non-selection for a procurement position. The petitioner then filed a complaint of with the Department of Labor (DOL) under the provision of 5 U.S.C. § 3330a. After DOL failed to resolve his complaint within the sixty days allowed by 5 USC § 3330a(d) the petitioner filed a timely administrative action with

the Merit System Protection Board (MSPB). When the MSPB did not resolve his complaint within the 120 days allowed by 5 U.S.C. § 3330b, he filed an action in United States District Court, Eastern District of Michigan, Southern Division (00-CV-70924-DT) (District Court) on February 22, 2000. The petitioner obtained leave of the District Court twice to amended his complaint for additional violation allegations after completing the required administrative redress procedure. The first amendment was filed August 26, 2000 after the MSPB misfiled his complaints dated November 17, 1999 and December 29, 1999. The second amendment was filed October 30, 2000 again after no action from the MSPB on his April 10, 2000 complaint. The District Court granted the respondent's summary judgment motion on May 31, 2001. The Sixth Circuit Court of Appeals, without oral argument, affirmed, for the reasons set forth in the District Court opinion, the judgment of the District Court on March 7, 2002 and denied a rehearing on May 7, 2002.

Veterans' Preference Background

Since the time of the Civil War, veterans of the Armed Forces have had some degree of preference in appointments to Federal jobs. Congress enacted laws to prevent veterans seeking Federal employment from being penalized for having served their country in uniform.

The Preference Act of 1944, as amended, is now codified in various provisions of title 5, United States Code. A preference eligible veteran is defined by statute (5 U.S.C. § 2108), and is one who is disabled or who served in the Armed

Forces during specified time periods or was awarded a military badge. Preference eligible veterans are supposed to be entitled to preference over other veterans or non-veterans within the competitive service. The respondent was free to use any of the various appointment processes authorized by the Office of Personnel Management (OPM) some of which, by regulation, exclude any preference for veterans. Had Congress want veterans' preference to be applicable to certain appointment processes they would have restricted it. Since no such restriction exists, the intent of Congress must have been that veterans' preference was applicable regardless of the appointment process. If the respondent had chosen to use Office of Personnel Management (OPM) registers or OPM Delegated Examining Units (DEU), then all eligible internal and external applicants would have been entitled to veterans' preference, if eligible. The respondent's use of any other appointment process denies veterans their preference. The respondent, not the petitioner, made the decision to use a process that unlawfully denied the petitioner and all other preference eligible veterans their rights to preference for their service.

Agencies have broad discretionary authority to appoint or reappoint (promote) individuals from several sources of eligible applicants including special appointing authorities, which ignore veterans' preference. This broad discretionary authority for an agency to use different appointment and reappointment appointment authorities should not be so broad as to effectively deny preference to the men and women who have defended this country and to be exempt from

judicial review. Veterans and non-veterans alike have judicial redress when agencies take discretionary actions that are based on prohibited reasons such as race, religion, and gender or are retaliatory for whistle blowing. Yet, the men and women whose lives have or do guarantee the availability of such redress and enforce the policy of the United States do not have judicial redress rights when they are denied statutory entitlements for their service.

Prior to the enactment of the Veterans Employment Opportunity Act of 1998 PL 105-339 (VEOA), when an agency chose to use their Office of Personnel Management approved merit promotion authority only current or former federal employees (status employees) were eligible for consideration. With the enactment of VEOA, veterans who are either preference eligible or have served three or more years in the Armed Forces are required to be considered if the agency is considering applicants from outside its own workforce and if a qualified veteran discovers that the agency is seeking applications. The enactment of VEOA modified all merit promotion systems to require consideration of eligible veterans and to require the publication of the position announcement. All positions in this action were <u>not</u> published as required by 5 U.S.C. 3304(f). Some of the applicants could have been applying for their initial appointment and, if preference eligible, could be entitled to preference over a preference eligible non-initial applicants (promotion). An OPM or DEU appointment register requires the use of veterans' preference for all eligible applicants regardless of any current or prior federal employment. VEOA modified the

merit promotion system to require consideration of all eligible veterans together with internal veterans and non-veterans. This change opened the merit promotion system to eligible veterans regardless of their current employment status but regulations unsupported by any statutory authority deny preference to any veteran seeking merit promotion.

The Merit System Protection Board addressed the reason why veterans' preference is in place and that it also applies to federal employees when it held in *Azdell* v. *Office of Personnel Management*, 87 M.S.P.R., 133, 168-69 (2000) the following (underline added)

> Despite the Congressional mandate that Federal personnel management should be implemented consistent with the principle that selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity, *see* 5 U.S.C. § 2301(b)(1), the numerous laws that provide advantages to preference eligible applicants or employees make it clear that Congress intended to except preference eligibles from the strict application of the merit system principles set forth at 5 C.F.R. § 2301 to reward these individuals for service to the country. *See, e.g.*, 5 U.S.C. §§ 2108, 3305(b), 3309-18, 3320, 3351-52, 3363, 3501, 3502(b), 3504, and 4303(e); 10 U.S.C. §§ 943(c)(2), 1784(c); 16 U.S.C. § 1308(b); 22 U.S.C. § 3941(c); 38 U.S.C. §§ 106(f), 7281(e), 7802(5); 39 U.S.C. § 1005(a). While

> an individual's status as a preference eligible, standing alone, may not indicate that the individual is any more or less qualified to perform a particular position than another candidate, Congress clearly believed that these individuals merited special consideration beyond a consideration limited solely to their technical or formal qualifications for a specific position. Because an individual's status as a preference eligible applicant is not a "non merit factor" within the context of 5 C.F.R. § 300.103(c), we reverse the merits initial decision to the extent that it found that the employment practice at issue in this case violated the equal employment opportunity basic requirement of 5 C.F.R. § 300.103(c).

Reason for granting the Petition

Three basic reasons for this court granting this petition, which are expanded upon below, are:

1. The rights to administrative and judicial redress for alleged violation of any statute or regulation relating to veterans' preference rights is of national importance. Congress recognized, even before this was a country, that without the service of our past, current and future veterans the rights our ancestors believed in, which were written into a new country's constitution, are guaranteed by the very same men and women who are now being denied their rights.

2. A conflict exists within the Circuit Courts of Appeals with the Sixth Circuit holding lack of jurisdiction and the Federal Circuit holding that jurisdiction exists.

3. The entitlement of veterans' preference to applicants who are seeking their initial appointment while denying eligible veterans who are not seeking their initial appointment for the same position conflicts with the equal protection under the law provision of our Constitution.

The District Court, by granting summary judgment, has decided a question of considerable importance to the citizens of the United States and its employee citizens. Do we treat our currently or previously employed preference eligible veterans differently than those who are not, nor have ever been, employed within the competitive service? Thus creating unequal protection under the law (i.e. the granting of preference unequally to eligible veterans based on current employment status). The petitioner is of the opinion that several genuine issues of material fact do exist but were ignored or otherwise overlooked by the District Court, which should have, if considered, been sufficient to deny the respondent's motion for summary judgment. In addition, the petitioner, in a separate redress action, obtained a judgment from the Federal Circuit Court of Appeals that held in Hunt v Office of Personnel Management (Appendix B) that the Merit System Protection Board was incorrect when it denied jurisdiction over Hunt's allegations but held that:

> If and when Hunt connects the OPM guidance with a concrete violation of his rights in connection with a specific employment opportunity, only then he will have made a sufficient allegation to state a claim under 5 U.S.C. § 3330a.

The holding by the District Court and the Sixth Circuit Court of Appeals decision in which the petitioner did make a connection with a specific employment opportunity for which the respondent was accepting applications from outside its workforce, thus meeting the requirements of 5 U.S.C. 3304(f) conflicts with the Federal Circuit Court of Appeals. The Federal Circuit Court of Appeals case was decided after the District Court had granted summary judgment but before the Sixth Circuit Court of Appeals upheld the summary judgment, thus creating a conflict within the Circuit Courts of Appeals.

The District Court opinion used to support their granting of the respondent's summary judgment motion is based on an erroneous interpretation of statutory language of both 5 U.S.C. § 3304(f) and 5 U.S.C. § 3330a. The District Court lacked any judicial post VEOA or statutory support for holding that

1. 5 U.S.C. § 3304(f) does not provide or assign individuals with veterans' preference points therefore it is not a statute or regulations regarding veterans' preference which would be required for this court to have jurisdiction. Yet none of the statutes listed within 5 U.S.C. § 2302(e)(1) which the court held were statutes relating to veterans' preference rights over which

it would have had jurisdiction provided for or assigns individuals with veterans' preference points. The District Court's opinion was silent on any rationale for this inconsistency.

2. 5 U.S.C. § 3304(f) applies only to preference eligibles who are not employed by the federal government and would otherwise have no guaranteed right to compete. No employee of the federal government has a statutory guaranteed right to compete for any position based on being a employee. Agencies can restrict the "area of consideration" to almost any area they choose, thus preventing employees or non-employees, except non-employee veterans, consideration when they are out of the area of consideration. Language which would have restricted the provisions of 5 U.S.C. § 3304(f)) to those veterans' preference eligible and those that have served 3 or more years who had not acquired competitive status or were not employees of the agency was included in a prior version of the VEOA bill but was removed from the final version prior to its enactment. This court held in *Russello v United States 464 US 16*, that "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment it may be presumed that the limitation was not intended"

3. 5 U.S.C. § 3304(f) is not a statute or regulation relating to veterans' preference; therefore, the Court does not have jurisdiction over allegations of violations of 5 U.S.C. 3304(f) under 5 U.S.C. § 3330b. In support of this opinion, the District Court cited *Ramsey v Office of Personnel Management 87 MSPR 98,102-03* which held that 5 U.S.C. § 3304(f) was not a

veterans' preference requirement as defined by 5 U.S.C. § 2302(b)(11) but 5 U.S.C. § 3304(f) was a statute or regulation dealing relating to veterans' preference rights as used in 5 U.S.C. § 3330a. Since the MSPB did rule on the merits of *Ramsey*, they must have found that 5 U.S.C. § 3304(f) was a statute relating to veterans' preference rights under which a preference eligible veterans could initiate administrative redress (5 U.S.C. § 3330a).

4. The District Court held that the Department of Labor (DOL) dismissed the petitioner's complaints. The DOL did not dismiss, nor does 5 U.S.C. 3330a provide DOL with the authority to dismiss, any of the petitioner's complaints. The petitioner terminated his complaints with the DOL as authorized by 5 U.S.C. § 3330a after he was convinced that resolution would not be forthcoming. 5 U.S.C. 3330a only provides DOL with authority to resolve a veteran's complaint or notify the veteran that they have been unable to resolve his complaint.

5. The District Court held that only allegations of violations of those statutes listed as veterans' preference requirement should be redressible. There is critical difference between denying a veterans' preference requirement (5 U.S.C. § 2302(b)(11)) and denying a statute or regulation relating to veterans' preference. The denial of a veterans' preference requirement (5 U.S.C. § 2302(b)(11)) is a prohibited personnel practice, which could cause the decision maker to be disciplined, whereas for a violation of a statute or regulation relating to veterans' preference the decision maker is not subject to discipline. The term "any statute or regulation relating to

veterans' preference" included, but should not be limited to, prohibited personnel practices. The clear language of 5 U.S.C. § 3330a indicates that Congressional intent was for preference eligible veterans, and only preference eligible veterans, to be able to obtain administrative or judicial redress upon any allegation of a violation of any statute or regulation that contained any reference to veterans' preference or one that is referenced to or by a veterans' preference statute or regulation. Appendix D contains a diagram depicting how the statutes referenced in this case are related to veterans' preference requirements. Had Congress not intended a broad scope for the term "statute or regulation relating to veterans' preference" they would have limited or been more specific in their language. This court held in *Russello v United States 464 US 16* that " Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment it may be presumed that the limitation was not intended".

The District Court inappropriately relied on

1. *Mitchell v Cohen 333 U.S. 411 (1948)* in which this court addressed what type service entitles a person to be eligible for veterans' preference consideration. A non-issue in this case since the respondent concurred that the petitioner was and is eligible for veterans' preference. The enactment in 1966 of 5 U.S.C. § 2108, which defines in clear language who is entitled to be considered a preference eligible veteran, supports this court's opinion.

2. *Qualls v United States 678 F.2d 190 (Ct. Cl. 1982)*, which addresses veterans' preference for promotion prior to VEOA when non-initial appointment applicants were prohibited from consideration. The court held that intra-agency transfers such as promotions were not subject to judicial review. With the enactment of VEOA especially 5 U.S.C. 3304(f) which changed removed promotions from a "intra-agency transfer" definition and 5 U.S.C. § 3330a which removed any restriction for judicial review or redress of the internal actions of governmental agency having to do with "rights under any statute or regulation relating to veterans' preference" (5 U.S.C. § 3330a(a)(1)).

3. *Brown v Department of Veterans Affairs 247 F 3d 122, — (Fed Cir 2001)*, which addressed veterans' preference for promotions after VEOA but was silent as to whether or not the agency had been accepting applications from outside the agency workforce. When an agency limits its consideration to internal agency applicants only then the provisions of 5 U.S.C. § 3304(f) not applicable.

The District Court quoted Rep Maloney's Congressional Record comments of Apr 10, 1997 (page 10) which address language removed from the bill before enactment which would have restricted 5 U.S.C. § 3304(f) to non-governmental employed veterans but the court ignored Mr. Sumpt's October 8, 1998 comments which were made 23 days before

the President signed PL 105-339 (VEOA) and after the language restricting 5 U.S.C. § 3304(f)to non-governmentally employed veterans had been removed (emphasis added)

> *Mr. STUMP.* Mr. Speaker, I rise today to voice my support for S. 1021, the Veterans Employment Opportunities Act of 1998. This bill originated in the House as H.R. 240 under the guidance of Representative John Mica, Chairman of the Subcommittee on Civil Service, and passed the House on April 9, 1997. S. 1021 provides improvements to veterans' preference and employment opportunities and strengthens veterans' employment rights with federal contractors. Mr. Speaker, through veterans' preference, wartime and disabled veterans get a small advantage competing for federal jobs, along with **promotion** and retention protection. To date, veterans comprise 27.6 percent of the federal workforce. The bill in its entirety demonstrates the commitment of the Congress to America's 26 million veterans that preference for federal jobs is an important way to share the sacrifices of war.

The District Court's denial of jurisdiction, if not reversed, effectively eliminates any administrative or judicial redress for any violation of a statute or regulation relating to veterans' preference rights that do not provide or assign individuals with veterans' preference points. Currently only 5 U.S.C. § 3309 assigns points for veterans' preference; therefore, only allegations of an agency's failure to properly

add either 5 or 10 points to an examination score would be subject to administrative or judicial redress under 5 U.S.C. § 3330a. Redress would not be available for any agency action ranging from failure to publish the announcement to passing over a disabled veteran without proper authorization. Even a prohibited personnel practice would not be judicially redressible.

Congress acted with clear intent when it used the language contained in 5 U.S.C. § 3330a to grant the right to any preference eligible veteran who alleges any agency has violated any "statute or regulation related to veterans' preference" to administrative and judicial redress. Congress expressed its desire for a rapid completion of the administrative redress process by authorizing any preference eligible veteran to terminate the administrative redress process and initiate judicial redress after only 181 days have elapsed from their initial complaint. This aggressive timeline for administrative redress clearly expresses Congressional intent for agencies to place preference eligible veterans' complaints on a fast track for resolution. Instead of complying with Congressional intent, agencies are aggressively attacking which rights constitutes veterans' preference and attempting to deny accountability for continuing to ignore the preferences that the men and women who have and are insuring our way of life are or have earned. Without the service of our veterans, neither this country nor its institutions, like this court, would exist.

Conclusion

Congress entitled preference eligible veterans to be able to seek judicial redress on any allegation of a violation of their rights earned defending this country. Despite clear language to the contrary, the District Court has denied a preference eligible veteran his right to judicial redress. Hon Sue W. Kelly ended her comments supporting HR 240 which became the Veterans Opportunity Act of 1998 before the House of Representative on April 9, 1997 (Page E626) with "If Federal agencies and Federal mangers were fulfilling their obligation to enforce current law, this legislation would not be necessary." The legislation was necessary and was enacted; however, it appears now that federal agencies are still not willing to fulfill their obligation to our preference eligible veterans by enforcing current laws, which now includes the legislation that Hon Sue W. Kelly referenced in her remarks. When statutory language is unclear, it should be construed during administrative or judicial redress in favor of preference eligible veterans, not the agency. However, when the statutory language is clear, there should be no necessity for administrative or judicial redress. Unfortunately, that is not the case yet.

The petition for a writ of certiorari should be granted.

Respectfully
Submitted

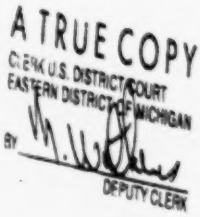
December 6,2002

Peter W. Hunt
Preference Eligible
Veteran

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PETER W.HUNT, CASE NO.: 00-CV-

V
UNITED STATES GOVERNMENT, OFFICE OF PERSONNEL MANAGEMENT, DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY,



Defendants

JUDGMENT

At a session of said Court,
held in the U.S. District
Courthouse, City of Detroit,
County of Wayne, State of Michigan
on May 31,2001

PRESENT: THE HONORABLE PATRICK J. DUGGAN U.S. DISTRICT JUDGE

On February 22, 2000, Plaintiff Peter W. Hunt filed a pro se complaint alleging that Defendants violated his veterans' preference rights. On June 23, 2000, this Court issued an Opinion and Order dismissing Plaintiff's claims against the United States Government, Office of Personnel Management, and the Department of Defense. On March 15, 2001, the only remaining defendant, the Department of the Army, filed a

motion for summary judgment. For the reasons stated in an Opinion issued this date,

IT IS ORDERED, ADJUDGED, AND DECREED that Defendant's motion for summary judgment is GRANTED, and Plaintiffs complaint is DISMISSED IN ITS ENTIRETY.

PATRICK DUGGAN

PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
Peter W. Hunt
Sheila H. Gaskell, A.U.S.A.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PETER W.HUNT,	CASE NO 00-CV-70924-DT
V	
UNITED STATES GOVERNMENT, OFFICE OF PERSONNEL MANAGEMENT, DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY, Defendants	A TRUE COPY CLERK U.S. DISTRICT COURT EASTERN DISTRICT OF MICHIGAN BY _____ DEPUTY CLERK

Opinion

This action involves veterans' preferences under the Veterans Employment Opportunity Act of 1998 ("VEOA"). Plaintiff Peter W. Hunt, a civilian employee of the Army proceeding pro se before this Court, alleges that the Army violated his veterans' preference rights in passing him over for various positions for which he applied and failing to timely provide him with the training necessary to compete for promotions. This matter is currently before the Court on Defendant's motion for summary judgment. For the reasons stated below, Defendant's motion shall be granted.

Discussion

Plaintiff has worked for the Army in Warren, Michigan since 1980. In early 1999, Plaintiff applied for a position as a Contract Specialist, GS-1102-13. On April 1, 1999, Plaintiff was notified that two

other individuals had been selected to fill the position. (Def.'s Br. Supp. Mot. Summ. J., Ex. 2).

Around the same time, Plaintiff applied for a position as a Procurement Analyst, GS-1102-13. On April 9, 1999, Plaintiff was notified that another individual was selected for the position. (*Id.*).

On May 14, 1999, Plaintiff filed a complaint with the Department of Labor pursuant to 5 U.S.C § 3330a, asserting, among other things, that he was denied the opportunity to apply for positions that other non-employee veterans with comparable qualifications were allowed to apply for, that job postings did not meet VEOA posting requirements, that the method used by the Army to generate a list of qualified candidates did not accord candidates appropriate veterans' preferences, and that he was denied both formal and on-the-job training necessary to compete for promotions. (*Id.*).

During this same time frame, Plaintiff again applied for the positions of contract specialist and procurement analyst. On June 9, 1999, Plaintiff was notified that he was not selected for either of the positions. (*Id.*). On June 30, 1999, Plaintiff filed another complaint with the Department of Labor alleging that the Army was not allowing him to exercise his rights regarding veterans' preferences. (*Id.*).

On July 12, 1999, the Department of Labor notified Plaintiff that it was closing his case because it did not fall under the veterans' preference statutes. (*Id.*). By letters dated July 21, 1999 and September 19, 1999, Plaintiff appealed to the Merit Systems Protection Board. (*Id.*).

According to Plaintiff, he filed at least three other complaints with the Department of Labor regarding his veterans' preference rights. (See 1st Amend. Compl, 2d Supp. Comp 1.). The Department of Labor dismissed each of these complaints, and Plaintiff appealed to the Merit Systems Protection Board.

Pursuant to 5 U.S.C. § 3330b, Plaintiff chose to terminate each of his appeals before the Merit Systems Protection Board and pursue judicial action. On February 22, 2000, Plaintiff filed a six-count complaint in this Court asserting various violations of the VEOA. As relief, Plaintiff seeks an order requiring Defendant to (1) nullify all position selections for which he was denied his veterans' preference rights, (2) insure the immediate and ongoing application of veterans' preference rights, (3) amend the relevant regulations to provide that veterans' preferences are applicable to all selections regardless of the method by which a position is filled, (4) suspend all selection actions until a disinterested third party appointed by this Court has evaluated the revisions sought by Plaintiff, (5) identify and notify all individuals who may have been denied a veterans' preference in past selections, (6) identify all positions for which Plaintiff should have been considered but was not due to Defendant's improper actions, (7) grant Plaintiff "all back pay and allowances together with benefits including but not limited to retirement computations that should have accrued to Plaintiff," and (8) reimburse Plaintiff for all costs associated with this action, including his costs before the Department of Labor. (Compl. at 7-8).

By leave of Court, Plaintiff filed a "First Amendment to Complaint" on August 18, 2000, raising two additional claims, and a "Second Supplement to Complaint"[1] on November 7, 2000, alleging another additional claim.' On June 23, 2000, this Court issued an Opinion and Order dismissing Defendants United States Government, Office of Personnel Management and the Department of Defense. Accordingly, the Department of the Army is the only remaining Defendant. On March 15, 2001, Defendant Department of Army filed a motion for summary judgment. Plaintiff filed a response to Defendant's motion on April 6, 2001.

Discussion

Summary judgment is proper only if there is no genuine issue as to any material fact, thereby entitling the moving party to judgment as a matter of law. *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702,709 (6th Cir. 2000); *see also* FED.R.Civ.P.56(c). There is no genuine issue of material fact for trial unless, by viewing the evidence in a light most favorable to the nonmoving party, a reasonable jury could "return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). On a motion for summary judgment,

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[1] Plaintiffs "Second Supplement to Complaint' 'was mistakenly filed by the Court before the Court's Order granting leave to file such was issued on November 15,2000. Defendant, however, did not oppose Plaintiffs motion for leave to file the Second Supplement to Complaint and has addressed each of the claims raised in Plaintiffs supplemental pleadings in their motion for summary judgment. Because the Court is satisfied that Defendant is entitled to summary judgment on such claims, it finds the Court's premature filing of Plaintiffs Second Supplement to Complaint to be of no harm in this case.

the moving party bears the initial responsibility of informing the Court of the basis for its motion and identifying those portions of the record that establish the absence of a material issue of fact. *Celotex Corp. v. Catrett,* 477 U.S. 317,323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Once the moving party has met its burden, the nonmoving party must go beyond the pleadings and come forward with specific facts to show that there is genuine issue for trial. Fed.R.Civ.P.56(e); *Celotex*, 477 U.S. at 322-24, 106 S. Ct. at 2552-53. The nonmoving party must present significant probative evidence in support of its opposition to the motion for summary judgment. *Moore v. Philip Morris Co., Inc.*, 8 F.3d 335, 339-40 (6th Cir. 1993). If, after adequate time for discovery, the party bearing the burden of proof fails to make a showing sufficient to establish an essential element of his claim, summary judgment is appropriate. *Celotex*, 477 U.S. at 322-24, 106 S. Ct. at 2552-53.

Defendant contends that it is entitled to summary judgment because this Court lacks jurisdiction over a majority of Plaintiff's claims, and because the statutory provisions relied upon by Plaintiff do not apply to the facts of this case, For purposes of this motion only, Defendant does not dispute that Plaintiff is eligible for veterans' preference under the VEOA by virtue of his military service during the Vietnam War. The Court Shall Address each of Defendant's arguments separately.

1. Jurisdiction

5 U.S.C. § 3330b(a), upon which Plaintiff relies for jurisdiction in this case, provides that in lieu of

continuing administrative redress provided under 5 U.S.C. § 3330a, a preference eligible veteran may elect to terminate the administrative proceedings and seek judicial relief. 5 U.S.C. § 3330a provides administrative redress for '[a] preference eligible who alleges that an agency has violated such individual's rights *under any statute or regulation relating to veterans' preferences.*" 5 U.S.C. § 3330a(a)(1). According to Defendant, 5 U.S.C. § 3304(f), upon which a number of Plaintiffs claims are based, is not a "statute or regulation relating to veterans' preferences" as required by § § 3330a and 3330b and therefore, this Court is without jurisdiction to hear such claims.

> In relevant part,5 U.S.S 3304, concerning competitive service examinations, states:
>
> (f)(1)Preference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures.
>
> (2) If selected, a preference eligible or veteran described in paragraph (1) shall receive a career or career-conditional appointment, as appropriate.
>
> (3) This subsection shall not be construed to confer an entitlement to veterans' preference that is not otherwise required by law.

(4) The area of consideration for all merit promotion announcements which include consideration of individuals of the Federal workforce shall indicate that preference eligibles and veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service are eligible to apply. The announcements shall be publicized in accordance with section 3327.

(5) The Office of Personnel Management shall prescribe regulations necessary for the administration of this subsection. The regulations shall ensure that an individual who has completed an initial tour of active duty is not excluded from the application of this subsection because of having been released from such tour of duty shortly before completing 3 years of active service, having been honorably released from such duty.

5 U.S.C. § 3304(f). Section 3304(f) is not a "statute or regulation relating to veterans' preferences." Such provision does not provide, or assign, individuals with veterans' preference points; rather, such provision simply provides that a federal agency may not deny a preference eligible veteran the opportunity to compete for a vacant position if the agency is accepting applications from outside its workforce with respect to such position.

Notably, earlier versions of § 3330a(a)(1) specifically referenced § 33040, stating:

> Any preference eligible *or other individual described in section 33040 (1)* who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference, *or any right afforded such individual by section 3304(f),* may file a complaint with the Secretary of Labor.

S. REP. No. 105-340 (Sept. 21, 1998), 1998 WL 658809 (emphasis added). The enacted version of § 3330a, however, does not include such references.

The VEOA also amended 5 U.S.C. § 2302 to make it a "prohibited personnel practice" for any agency to knowingly "take, recommend, or approve any personnel action if the taking of such action would violate a *veterans' preference requirement."* 5 U.S.C. § 2302(b)(11)(A) (emphasis added). Similarly, the VEOA made it a "prohibited personnel practice" to fail to take such action if such failure would "violate a *veteran's preference requirement."* 5 U.S.C. § 2302(b)(11)(B) (emphasis added). The VEOA further defines the term "veteran's preference requirement" as:

> A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) sub chapter II of chapter 75 [5 U.S.C.A. § 7511 et seq.] and section 7701.

(B) Sections 943(c)(2) and 1784(c) of title 10.
(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act *[16U.S.C.A.§ 1308(b)]*.
(D) Section 301(c) of the Foreign Service Act of 1980 [22 U.S.C.A. § 3941(c)]
(E) Sections 106(0, 7281(e), and 7802(5) of title 38.
(F) Section 1005(a) of title 39.
(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations as being a veterans' preference requirement for the purposes of this subsection.
(H) Any regulation prescribed under subsection (b) or (c) of section 1302and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

5 U.S.C. § 2302(e)(1). Section *3304(f)* does not appear in the VEOA's list of "veteran's preference requirements."

In *Ramsey v. Office cf Personnel Management,* 87M.S.P.R. 98,102-03 (2000),[2] the Merit Systems Protection Board found that, because of its absence in § 2302(e)(1), § 3304 did not constitute a veteran's preference requirement. Furthermore, as indicated by the Board in *Ramsey,*

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[2] *See* Def.'s Br. Supp. Mot. Summ. J., Ex. 1.

§ 3304(f)(3) specifically provides that § 3304(f) "shall not be construed to confer an entitlement to veterans' preference that is not otherwise required by law." *Id.* at 103.

Because § 3304(f) is not a "statute or regulation relating to veterans' preferences," and therefore, this Court does not have jurisdiction over such claims under § 3330b, Defendant's motion for summary judgment shall be granted with respect to all of Plaintiff s claims under § 3304(f).

2. 5 U.S.C. § 3304 Claims

Even if the Court did have jurisdiction over Plaintiffs § 3304(f) claims, such claims would nonetheless fail as § 3304(f) does not apply to Plaintiff. Plaintiff asserts that Defendant has violated his rights under 5 U.S.C. §33 04(f) by (1) denying him an opportunity to apply for positions for which Defendant is accepting applications from outside its work force (Issue One);[3] (2) failing to publish announcements of positions meeting VEOA requirements (Issue Two); (3) requiring that certain positions be filled by existing employees, thereby precluding applications from non-employed veterans (Issue Four); (5) denying Plaintiff's request to be placed in Defendant's automated referral system, referred to as Easy ACCES (Issue Seven); and (6) denying Plaintiffs application for a position because of time-in-grade and grade promotion restrictions (Issue Eight).

[3] Plaintiff has designated each of his claims as an "issue" instead of a "Count."

Section 3304(f), however, only applies to preference eligible veterans who are not employed by the federal government and would otherwise have no guaranteed right to compete for such positions. Section 3304(f) does not apply to promotions or transfers within the competitive service. Rather, individuals already employed by the federal government, such as Plaintiff, are already eligible to compete for merit promotions and transfers by nature of their employment status. This interpretation of § 3304(f) is consistent with both the Veterans' Preference Act, and the legislative history of the VEOA itself.

The Veteran's Preference Act, the VEOA's precursor, was enacted in 1944 to give wartime and disabled veterans preferential consideration for certain jabs and for retention in the event of a reduction in force. *See Mitchell v. Cohen,* 333 U S. 411, 418-21, 68 S. Ct. 518, 522-23, 92 L. Ed. 774 (1948). Judicial interpretation of the Veteran's Preference Act has established that veterans' preferences do not apply to an employee's transfer or other intra-agency movement, such as promotions; rather, the preferences provided for under the Veteran's Preference Act apply only to a veteran's initial appointment. *See Qualls v. United States,* 678 F.2d 190, 196-97 (Ct. Cl. 1982) (denying plaintiff's veterans' preference claim because plaintiff's status as a 5-point veteran did not entitle him to any preference over non-veteran employee in competition for promotion as "[a] veteran is entitled to preference over non-veterans only in connection with an initial appointment to the federal service or in connection with a reduction-in-force among personnel in the same competitive level, neither of which was involved in

the competition between the plaintiff and [the other applicant]"); *see also Brown v. Department of Veterans Affairs*, 247 F.3d 1222,-- (Fed. Cir. 2001) ("We affirm the proposition established in *Crowley*, namely, that veterans are not accorded any preference under the [Veteran's Preference Act] when seeking promotion or intra-agency transfers."); *Bates v. Runyon*, No. 95-5183, 1996 WL 532210 (10th Cir. 1996) (same).

Nothing in § 3304(f), nor the VEOA, suggests that veterans' preferences have been expanded beyond initial appointment. Section 2 of the VEOA, which became 5 U.S.C. § 3304(f),was specifically entitled "Access For Veterans." Veterans Employment Opportunity Act, Pub. L. No. 105-339,112 Stat. 3182 (1998) (emphasis added). Statements made during congressional hearings further suggest that the VEOA was not meant to expand veterans' preference rights beyond initial appointment. For example, one representative remarked that the VEOA "opens Federal employment opportunities for individuals honorably discharged from the military by eliminating artificial barriers which prevent them from competing for Federal jobs *because they are not already civilian employees or employees of a particular agency.*" 143 CONG. REC. E631-02 (daily ed. Apr. 10, 1997) (statement of Rep. Maloney), 1997 WL 168838 (emphasis added). Another representative commented that:

> [V]eterans entitled to preference and other veterans who have 3 years of honorable service in the military will receive expanded opportunities to compete for Federal jobs.

> Very often, Mr. Speaker, Federal agencies will only allow current civilian employees to apply for vacancies. Veterans who do not work for the Federal Government are barred from even competing on their merits for these jobs. That will change when this legislation is enacted. Under this bill whenever an agency opens the competition to civilian employees outside of its own workforce, it must also allow these qualified veterans to compete.

144 CONG. REC. 1110185-02 (daily ed. Oct. 8, 1998) (statement of Rep. Mica), 1998 WL 716410.

In summary, Defendant's motion for summary judgment with respect to Plaintiffs claims under § 3304(f) shall be granted on the additional ground that § 3304(f), and veterans' preferences in general, only apply to initial appointments, not promotions or transfers.

3. Qualified Candidate Lists

Plaintiff also asserts that Defendant's qualified candidate list generated through the Easy ACCES system, which does not provide for a veterans' preference, violates the VEOA, specifically, 5 U.S.C. §§ 3304, 3313, 3318, and 3361 (Issues Three & Nine).

The Army Civilian Career Evaluation System (ACCES) is an automated system used to refer candidates for high grade civilian positions under merit promotion procedures. As discussed supra,

veterans' preferences do not apply to promotions within competitive service, therefore, Plaintiffs claims regarding the Easy ACCES system are without merit. As a civilian employee of the Army, Plaintiff was not entitled to a veterans' preference in applying for promotions or transfers. Therefore, the Easy ACCES system's failure to assign such points does not violate the VEOA.

4. Failure to Train

In addition to not being able to compete for open positions, Plaintiff alleges that he was denied the formal and on the job training required to develop the skills necessary to compete for open positions (Issue Five). According to Plaintiff, Defendant's failure to train violates the requirement set forth in 5 C.F.R. § 307.102 that federal agencies provide maximum employment and job advancement opportunities to veterans of the Vietnam era. Plaintiff alleges that the necessary training was offered each year from 1980 through 1992, and that he did not receive such training until 1992.

Defendant is entitled to summary judgment with respect to such claim because Plaintiff failed file a timely administrative complaint with respect to this issue. Administrative complaints with the Department of Labor must be filed within sixty days of the alleged violation. 5 U.S.C. § 3330a(a)(2)(A). Plaintiff alleges that Defendant failed to provide him with the necessary training to enable him to apply for promotions. As Plaintiff himself acknowledges, these violations occurred from 1980 through 1992. Plaintiff did not file his administrative complaint until 1999. Assuming §

3330a even applies to violations that occurred before its enactment, Plaintiff clearly missed the sixty day filing period. Therefore ,jurisdiction never vested in the Merit Systems Protection Board, or this Court, with respect to this claim. See 5 U.S.C. §§ 3330a, 3330b.

Furthermore, Plaintiff's complaint centers around certain promotions he sought in 1999. As Plaintiff acknowledges, he received the necessary training in 1992,well before he applied for the promotions at issue in this case. Plaintiff has failed to allege that he was denied earlier promotions or job opportunities because of Defendant's failure. Viewing the evidence in a light most favorable to Plaintiff, as the Court must do on summary judgment, the Court is satisfied that no reasonable jury could conclude that Plaintiff was harmed by any alleged failure on Defendant's part. Accordingly, Defendant's motion for summary judgment shall be granted with respect to this issue also.

5. Plaintiffs Qualification-Based Claims

Plaintiff also alleges that he was more qualified than the individuals ultimately selected for the various positions for which he applied, and that, in violation of 5 U.S.C. § 3311, Defendant did not allow him to detail his qualifications, skills, and abilities within the military to support his selection (Issues Six & Nine).

This Court has no jurisdiction to review Plaintiff's claim that Defendant passed him over for less-qualified individuals. "[T]here is perhaps no principle more settled in this area of the law than

that promotion and non-promotion of employees within a department or agency of Government is a matter of supervisory discretion not ordinarily subject to judicial review." Crowley v. United States, 527 F.2d 1176, 1184 (Ct. Cl. 1975). "Administrative officials have the discretion to make both good and bad decisions on personnel matters." *Qualls,* 678 F.2d at 196. Accordingly, Defendant is entitled to summary judgment with respect to Plaintiff's claims that he was "more qualified "than the individuals chosen by Defendant.

6. Lack of Discovery

The Court notes that Plaintiff has alleged in response to Defendant's motion that summary judgment should not be granted because Defendant has "refused the plaintiff access to any records, which could either confirm or refute the plaintiff's allegations." (Pl.'s Resp. at 1). The Court, however, is satisfied that none of the discovery allegedly withheld from Plaintiff would rebut any of the Court's preceding conclusions. Accordingly, summary judgment shall be granted in favor of Defendant.

Conclusion

For the reasons stated above, Defendant's motion for summary judgment shall be granted, and Plaintiffs complaint shall be dismissed in its entirety.

A Judgment consistent with this Opinion shall issue forthwith.

PATRICK DUGGAN

PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
Peter W. Hunt
Sheila H. Gaskell, A.U.S.A.

No. 01-1989

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

PETER W. HUNT, Plaintiff Appellant, v. UNITED STATES ARMY, Defendant- Appellee, UNITED STATES OF AMERICA; OFFICE OF PERSONNEL MANAGEMENT; and UNITED STATES DEPARTMENT OF DEFENSE, Defendants.	*FILED* MAR 7 2002 LEONARD GREEN. Clerk ORDER NOT RECOMMENDED FOR FULL-TEXT PUBLICATION **Sixth Circuit Rule 28(g) limits citation to specific situations Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.** **This notice is to be prominently displayed it this decision is reproduced.**

Before: MARTIN, Chief Judge; BOGGS and DAUGHTREY, Circuit Judges.

This pro se Michigan litigant appeals a district court judgment dismissing his complaint filed under the Veterans Employment Opportunity Act of 1998 (VEOA). This case has been referred to a panel of the court pursuant to Rule 340)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees

that oral argument is not needed. Fed. R. App. P. 34(a).

Peter W. Hunt is a civilian employee of the U. S. Army. Hunt sued the United States Government (USG), the Office of Personnel Management (OPM), the Department of Defense (DOD), and the Army, claiming that the defendants violated his veterans' preference rights under 5 U.S.C. § 3304(f), 3311, 3313, 3318, 3361, and 5 C.F.R. § 307, because he was not selected or considered for merit promotions and was denied training.

The district court dismissed the USG, OPM, and DOD because Hunt had not pursued administrative remedies against these agencies before filing suit as required by 5 U.S.C. §§ 3330a(a)(2)(B), 3330b, and Hunt's complaint failed to state a claim upon which relief could be granted against them. Thereafter, the district court granted summary judgment in favor of the Army. *Hunt v. United States Government,* 154 F. Supp. 2d 1047 (E.D. Mich. 2001).In his timely appeal, Hunt essentially reasserts the claims that he set forth in the district court.

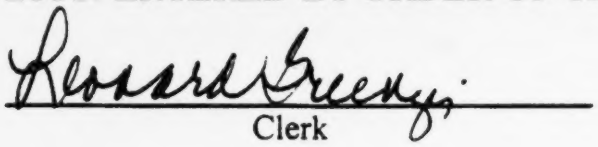
Whether the district court properly dismissed a suit pursuant to Fed. R. Civ. P. 12(b)(6) is a question of law subject to de novo review. *Sistrunk v. City of Strongsville,* 99 F.3d 194,197 (6th Cir. 1996). The court must construe the complaint in a light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of her claims that would entitle her to relief. Id.

Similarly, this court reviews de novo a district court's grant of summary judgment. *Pinney Dock and Transp. Co. v. Penn Cent. Corp., 838* F.2d 1445, 1472 (6th Cir. 1988). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Avery v. King,* 110 F.3d 12,13-14 (6th Cir.1997). The moving party is entitled to judgment as a matter of law where, after adequate time for discovery, the nonmoving party fails to establish the existence of an element essential to its case and on which that party would bear the burden at trial. *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).* The moving party bears the initial burden of establishing an absence of evidence to support the nonmoving party's case. *See id.* Once the moving party has met its burden of production, the nonmoving party cannot rest on its pleadings, but must present significant probative evidence in support of the complaint to defeat the motion for summary judgment. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986).* The mere existence of a scintilla of evidence to support plaintiff s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. *See id. at* 252.

Upon review, we conclude that the district court properly granted summary judgment in favor of the Army.

Accordingly, the district court's judgment is hereby affirmed pursuant to Rule 34(j)(2)(C), Rules of the Sixth Circuit, for the reasons set

forth in the district court's opinion of May 31, 2001. ENTERED BY ORDER OF THE COURT



Clerk

No. 01-1989

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAY 7 2002
LEONARD GREEN, Clerk

PETER W. HUNT,

Plaintiff-Appellant,

v. ORDER

UNITED STATES ARMY,
Defendant-Appellee,
UNITED STATES OF AMERICA;
OFFICE OF PERSONNEL MANAGEMENT; and
UNITED STATES DEPARTMENT OF DEFENSE,
Defendants.

Before: MARTIN, Chief Circuit Judge; BOGGS and DAUGHTREY, Circuit Judges.

Plaintiff-appellant has filed a petition for rehearing of this court's order of March 7, 2002, affirming the district court's judgment dismissing his complaint filed under the Veterans Employment Opportunity Act of 1998.

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. Fed. R. App. P. 40(a).

The petition for rehearing is thus denied.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

01-3177

PETER W. HUNT,
Petitioner,
v.
OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

DECIDED: October 18, 2001

Before LOURIE, Circuit Judge, ARCHER, Senior Circuit Judge, and GAJARSA, Circuit Judge.

PER CURIAM.

DECISION

Peter W. Hunt appeals from the decision of the Merit Systems Protection Board dismissing his appeal for lack of jurisdiction and alternatively ruling against him on the merits. Hunt v. OPM, No. CH-3443-00-0859-I-1, slip op. at 3-4 (MSPB Dec. 19, 2000). Although the Board erred in dismissing Hunt's appeal for lack of jurisdiction, we affirm the Board's decision on the merits.

DISCUSSION

Hunt is a veteran employed by the Department of the Army. Id. at 1. Following the posting of

information on the Office of Personnel Management's (OPM's) web site concerning the awarding of veterans' hiring preferences under the Veterans Opportunity Act (VEOA) of 1998, Hunt filed a complaint with the Department of Labor on June 24, 2000. Id. at 2. In his complaint, Hunt challenged the legitimacy of OPM's explanation that the veterans' preferences defined in 5 U.S.C. § 3304(f) are to be applied to non-status applicants only. Id. OPM's guidance directed hiring agencies not to credit a preference eligible veteran with a veterans' preference when that veteran applies for a promotion open only to status applicants, defined as current or certain former federal employees.

After receiving no response from Labor, Hunt appealed to the Board on August 25, 2000, id. at 2, adding an additional complaint that the OPM guidance would deny the veterans' preference rights provided by 5 U.S.C. § 3313 for internal candidates passing an examination required by 5 U.S.C. § 3361 for promotion in the competitive services. The Board then ordered Hunt to prove that the Board had jurisdiction to hear the appeal. Acknowledgment Order, No. CH-3443-00-0859-1-1 (MSPB Sept. 26, 2000). Hunt responded that 35 U.S.C. § 3330a(d) grants the Board jurisdiction whenever Labor is unable to resolve a complaint, submitted pursuant to 35 U.S.C. § 3330a(a), within sixty days. Brief in Support for Jurisdiction, Hunt (No. CH-3443-00-0859-1-1). Hunt's brief added an additional complaint that the OPM guidance would deny veterans' preference rights under 5 U.S.C. §§ 3317-18. Id. at 1-2.

The Administrative Judge ("AX) concluded that Hunt failed to meet his burden of establishing Board jurisdiction because he did "not allege . . . that OPM directly interfered with his candidacy for any specific selection action by his employing agency." Hunt, No. CH-3443-00-0859-I-1, slip op. at 3. The AJ went on to state that Hunt may request, pursuant to 5 U.S.C. § 1204(f) and 5 C.F.R. § 1203.11, Board review of the OPM guidance, id. at 3, and that in such a case Hunt's appeal would fail on the merits because 5 U.S.C. § 3304(f) does not grant veterans' preference, and 5 U.S.C. §§ 3313 and 3361 "relate to applicants' initial entrance into the competitive service," whereas OPM's guidance addresses only "merit promotion actions of veterans already employed in the competitive service." Id. at 5. The AJ also concluded that Hunt had not alleged that the OPM guidance would violate 5 U.S.C. §§ 3317-18 and 3361 "as they relate to the appellant's candidacy for any specified position." Id. at 6. Because Hunt did not petition for review by the full Board, the AJ's decision became the final decision of the Board. 5 C.F.R. § 1201.113 (2001).

Hunt timely appealed to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9) (1994).

The scope of the Board's jurisdiction is a question of law that we review without deference. Kelley v. MSPB, 241 F.3d 1368, 1369 (Fed. Cir. 2001). Otherwise, the scope of our review of a decision of the Board is limited. We must affirm the Board's decision on the merits unless it is: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law,

rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C, § 7703(c) (2000); Jennings v. MSPB, 59 F.3d 159, 160 (Fed. Cir. 1995).

On appeal, Hunt first challenges the Board's denial of jurisdiction. More specifically, Hunt argues that compliance with 5 U.S.C. § 3330a(d) provides the Board with jurisdiction as a matter of right and that the Board erred in requiring that he show denial of a specific position. Certain of Hunt's other arguments are directed at the substance of his claim, i.e., that the OPM guidance is inconsistent with the statutory provisions for granting veterans' preferences. The government argues that the language of § 3330a(a)(1) requires Hunt to "alleged that an agency has violated [his] rights ... to veterans' preference" and that Hunt failed to make such an allegation in connection with a specific employment opportunity.

We first consider the question of the Board's jurisdiction. In relevant part, VEOA provides as follows:

(a)(1) A preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor.

(d)(1) If the Secretary of Labor is unable to resolve a complaint under subsection (a) within 60 days after the date on which it is filed, the complainant may elect to appeal the alleged violation to the Merits Systems Protection Board ...

5 U.S.C. § 3330a (2000). That statute thus grants the Board jurisdiction to hear and decide cases

in which a preference eligible veteran has complained to Labor of a violation and not received satisfactory resolution of his complaint within sixty days. That is the statutory provision that Hunt cited as the basis for his complaint. The AJ concluded that Hunt did not fulfill the requirement of the statute by "alleg[ing] that an agency has violated [his] rights ... to veterans' preference." Id. The Board held that it therefore lacked jurisdiction over the appeal. We agree that Hunt's complaint based on §3330a fails, but not for lack of Board jurisdiction. Jurisdiction relates to the power of a tribunal to hear and decide a case. That was not lacking here. Hunt is a preference eligible veteran who alleged that an agency violated his rights under a statute relating to veterans' preference, and he did file a complaint with the Secretary of Labor that was not resolved with sixty days. Thus, there was Board jurisdiction.

However, while the Board erred in dismissing Hunt's complaint for lack of jurisdiction, the error was merely linguistic. The Board should have characterized its ruling against Hunt as being on the merits for failure to prove a violation. Hunt has not shown that he was denied any preference to which he was entitled for any employment vacancy. In fact, he has not shown that he has applied for any vacancy at all. As the AJ stated, he did "not allege ... that OPM directly interfered with his candidacy for any specific selection action by his employing agency." Hunt, No. CH-3443-00-0859-I-1, slip op.at 3. To put it differently, Hunt's generalized grievance is not grounded in a "violation," as the statute requires. Because Hunt has failed to

show a violation, the disposition of this case should be failure on the merits rather than dismissal for lack of jurisdiction. See Spruill v. MSPB, 978 F.2d 679, 686 (Fed. Cir. 1992). If and when Hunt connects the OPM guidance with a concrete violation of his rights in connection with a specific employment opportunity, only then he will have made a sufficient allegation to state a claim under 5 U.S.C. § 3330a. Hunt argues that OPM's guidance is inconsistent with statutory provisions. Jurisdiction for such a claim is provided by 5 U.S.C. § 1204(f)(1). That statute provides that the Board shall review an OPM rule or regulation "(A) on its own motion; (B) on the granting by the Board . . . of any petition ... ; or (C) on the filing of a written complaint by requesting such a review." 5 U.S.C. § 1204(f)(1) (2000). See also 5 C.F.R. § 1203.11 (2001). However; Hunt did not plead that provision as a basis for jurisdiction. Nor did the AJ exercise jurisdiction under that provision to review OPM's guidance. The AJ's comments on the substantive issues were, thus, dicta. Because those issues were not decided by the Board, they are not before us.

We have considered Hunt's other arguments and find them unconvincing.

We therefore conclude that the Board erred in dismissing Hunt's claim for lack of jurisdiction, but we affirm the Board's decision on the merits for the reasons set forth above.

PUBLIC LAW 105-339-OCT. 31, 1998

VETERANS EMPLOYMENT OPPORTUNITIES ACT OF 1998

Public Law 105-339
105th Congress

An Act

To amend title 5, United States Code, to provide that consideration may not be denied to preference eligibles applying for certain positions in the competitive service, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Veterans Employment Opportunities Act of 1998".

SEC. 2. ACCESS FOR VETERANS.

Section 3304 of title 5, United States Code, is amended by adding at the end the following:

"(f)(1) Preference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures.

"(2) This subsection shall not be construed to confer an entitlement to veterans' preference that is not otherwise required by law.

"(3) The area of consideration for all merit promotion announcements which include consideration of individuals of the Federal workforce shall indicate that preference eligibles and veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service are eligible to apply. The announcements shall be publicized in accordance with section 3327.

"(4) The Office of Personnel Management shall establish an appointing authority to appoint such preference eligibles and veterans."

SEC. 3. IMPROVED REDRESS FOR PREFERENCE ELIGIBLES.

(a) IN GENERAL.—Subchapter I of chapter 33 of title 5, United States Code, is amended by adding at the end the following:

"§ 3330a. Preference eligibles; administrative redress

"(a)(1) A preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor.

"(2)(A) A complaint under this subsection must be filed within 60 days after the date of the alleged violation.

"(B) Such complaint shall be in writing, be in such form as the Secretary may prescribe, specify the agency against which the complaint is filed, and contain a summary of the allegations that form the basis for the complaint.

"(3) The Secretary shall, upon request, provide technical assistance to a potential

complainant with respect to a complaint under this subsection.

"(b)(1) The Secretary of Labor shall investigate each complaint under subsection (a).

"(2) In carrying out any investigation under this subsection, the Secretary's duly authorized representatives shall, at all reasonable times, have reasonable access to, for purposes of examination, and the right to copy and receive, any documents of any person or agency that the Secretary considers relevant to the investigation.

"(3) In carrying out any investigation under this subsection, the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of the subpoena or contumacy and on request of the Secretary, the Attorney General may apply to any district court of the United States in whose jurisdiction such disobedience or contumacy occurs for an order enforcing the subpoena.

"(4) Upon application, the district courts of the United States shall have jurisdiction to issue writs commanding any person or agency to comply with the subpoena of the Secretary or to comply with any order of the Secretary made pursuant to a lawful investigation under this subsection and the district courts shall have jurisdiction to punish failure to obey a subpoena or other lawful order of the Secretary as a contempt of court.

"(c)(1)(A) If the Secretary of Labor determines as a result of an investigation under subsection (b) that the action alleged in a complaint under subsection (a) occurred, the Secretary shall attempt to resolve the complaint by making reasonable efforts to ensure that the agency specified in the complaint complies with

applicable provisions of statute or regulation relating to veterans' preference.

"(B) The Secretary of Labor shall make determinations referred to in subparagraph (A) based on a preponderance of the evidence.

"(2) If the efforts of the Secretary under subsection (b) with respect to a complaint under subsection (a) do not result in the resolution of the complaint, the Secretary shall notify the person who submitted the complaint, in writing, of the results of the Secretary's investigation under subsection (b).

"(d)(1) If the Secretary of Labor is unable to resolve a complaint under subsection (a) within 60 days after the date on which it is filed, the complainant may elect to appeal the alleged violation to the Merit Systems Protection Board in accordance with such procedures as the Merit Systems Protection Board shall prescribe, except that in no event may any such appeal be brought—

"(A) before the 61st day after the date on which the complaint is filed; or

"(B) later than 15 days after the date on which the complainant receives written notification from the Secretary under subsection (c)(2).

"(2) An appeal under this subsection may not be brought unless—

"(A) the complainant first provides written notification to the Secretary of such complainant's intention to bring such appeal; and

"(B) appropriate evidence of compliance with subparagraph (A) is included (in such form and manner as the Merit Systems Protection Board may prescribe) with the notice of appeal under this subsection.

"(3) Upon receiving notification under paragraph (2)(A), the Secretary shall not continue to investigate or further attempt to resolve the complaint to which the notification relates.

"(e)(1) This section shall not be construed to prohibit a preference eligible from appealing directly to the Merit Systems Protection Board from any action which is appealable to the Board under any other law, rule, or regulation, in lieu of administrative redress under this section.

"(2) A preference eligible may not pursue redress for an alleged violation described in subsection (a) under this section at the same time the preference eligible pursues redress for such violation under any other law, rule, or regulation.

"§ 3330b. Preference eligibles; judicial redress

"(a) In lieu of continuing the administrative redress procedure provided under section 3330a(d), a preference eligible may elect, in accordance with this section, to terminate those administrative proceedings and file an action with the appropriate United States district court not later than 60 days after the date of the election.

"(b) An election under this section may not be made—

"(1) before the 121st day after the date on which the appeal is filed with the Merit Systems Protection Board under section 3330a(d); or

"(2) after the Merit Systems Protection Board has issued a judicially reviewable decision on the merits of the appeal.

"(c) An election under this section shall be made, in writing, in such form and manner as the Merit Systems Protection Board shall by regulation prescribe. The election shall be effective as of the date on which it is received, and the

administrative proceeding to which it relates shall terminate immediately upon the receipt of such election.

"§ 3330c. Preference eligibles; remedy

"(a) If the Merit Systems Protection Board (in a proceeding under section 3330a) or a court (in a proceeding under section 3330b) determines that an agency has violated a right described in section 3330a, the Board or court (as the case may be) shall order the agency to comply with such provisions and award compensation for any loss of wages or benefits suffered by the individual by reason of the violation involved. If the Board or court determines that such violation was willful, it shall award an amount equal to backpay as liquidated damages.

"(b) A preference eligible who prevails in an action under section 3330a or 3330b shall be awarded reasonable attorney fees, expert witness fees, and other litigation expenses.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 33 of title 5, United States Code, is amended by adding after the item relating to section 3330 the following:

"3330a. Preference eligibles; administrative redress.
"3330b. Preference eligibles; judicial redress.
"3330c. Preference eligibles; remedy.".

SEC. 4. EXTENSION OF VETERANS' PREFERENCE.

(a) AMENDMENT TO TITLE 5, UNITED STATES CODE.—Paragraph (3) of section 2108 of title 5, United States Code, is amended by striking "the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service, or the General Accounting Office;" and inserting "or the Federal Bureau of Investigation

and Drug Enforcement Administration Senior Executive Service;".

(b) AMENDMENTS TO TITLE 3, UNITED STATES CODE.—

(1) IN GENERAL.—Chapter 2 of title 3, United States Code, is amended by adding at the end the following:

"§ 115. Veterans' preference

"(a) Subject to subsection (b), appointments under sections 105, 106, and 107 shall be made in accordance with section 2108, and sections 3309 through 3312, of title 5.

"(b) Subsection (a) shall not apply to any appointment to a position the rate of basic pay for which is at least equal to the minimum rate established for positions in the Senior Executive Service under section 5382 of title 5 and the duties of which are comparable to those described in section 3132(a)(2) of such title or to any other position if, with respect to such position, the President makes certification—

"(1) that such position is—

"(A) a confidential or policy-making position; or

"(B) a position for which political affiliation or political philosophy is otherwise an important qualification; and

"(2) that any individual selected for such position is expected to vacate the position at or before the end of the President's term (or terms) of office.

Each individual appointed to a position described in the preceding sentence as to which the expectation described in paragraph (2) applies shall be notified as to such expectation, in writing, at the time of appointment to such position.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 2 of title 3, United States Code, is amended by adding at the end the following:

"115. Veterans' preference.".

(c) LEGISLATIVE BRANCH APPOINTMENTS.—

(1) DEFINITIONS.—For the purposes of this subsection, the terms "covered employee" and "Board" shall each have the meaning given such term by section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301).

(2) RIGHTS AND PROTECTIONS.—The rights and protections established under section 2108, sections 3309 through 3312, and subchapter I of chapter 35, of title 5, United States Code, shall apply to covered employees.

(3) REMEDIES.—

(A) IN GENERAL.—The remedy for a violation of paragraph (2) shall be such remedy as would be appropriate if awarded under applicable provisions of title 5, United States Code, in the case of a violation of the relevant corresponding provision (referred to in paragraph (2)) of such title.

(B) PROCEDURE.—The procedure for consideration of alleged violations of paragraph (2) shall be the same as apply under section 401 of the Congressional Accountability Act of 1995 (and the provisions of law referred to therein) in the case of an

alleged violation of part A of title II of such Act.

(4) REGULATIONS TO IMPLEMENT SUBSECTION.—

(A) IN GENERAL.—The Board shall, pursuant to section 304 of the Congressional Accountability Act of 1995 (2 U.S.C. 1384), issue regulations to implement this subsection.

(B) AGENCY REGULATIONS.—The regulations issued under subparagraph (A) shall be the same as the most relevant substantive regulations (applicable with respect to the executive branch) promulgated to implement the statutory provisions referred to in paragraph (2) except insofar as the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this subsection.

(C) COORDINATION.—The regulations issued under subparagraph (A) shall be consistent with section 225 of the Congressional Accountability Act of 1995 (2 U.S.C. 1361).

(5) APPLICABILITY.—Notwithstanding any other provision of this subsection, the term "covered employee" shall not, for purposes of this subsection, include an employee—

(A) whose appointment is made by the President with the advice and consent of the Senate;

(B) whose appointment is made by a Member of Congress or by a committee or subcommittee of either House of Congress; or

(C) who is appointed to a position, the duties of which are equivalent to those of a Senior Executive Service position (within the meaning of section 3132(a)(2) of title 5, United States Code).

(6) EFFECTIVE DATE.—Paragraphs (2) and (3) shall be effective as of the effective date of the regulations under paragraph (4).

(d) JUDICIAL BRANCH APPOINTMENTS.—

(1) IN GENERAL.—Subject to paragraphs (2) and (3), the Judicial Conference of the United States shall prescribe procedures to provide for—

(A) veterans' preference in the consideration of applicants for employment, and in the conduct of any reductions in force, within the judicial branch; and

(B) redress for alleged violations of any rights provided for under subparagraph (A).

(2) PROCEDURES.—Under the procedures, a preference eligible (as defined by section 2108 of title 5, United States Code) shall be afforded preferences in a manner and to the extent consistent with preferences afforded to preference eligibles in the executive branch.

(3) EXCLUSIONS.—Nothing in the procedures shall apply with respect to an applicant or employee—

(A) whose appointment is made by the President with the advice and consent of the Senate;

(B) whose appointment is as a judicial officer;

(C) whose appointment is required by statute to be made by or with the approval of a court or judicial officer; or

(D) whose appointment is to a position, the duties of which are equivalent to those of a Senior Executive Service position (within the meaning of section 3132(a)(2) of title 5, United States Code).

(4) DEFINITIONS.—For purposes of this subsection, the term "judicial officer" means a justice, judge, or magistrate judge listed in subparagraph (A), (B), (F), or (G) of section 376(a)(1) of title 28, United States Code.

(5) SUBMISSION TO CONGRESS; EFFECTIVE DATE.—

(A) SUBMISSION TO CONGRESS.—Not later than 12 months after the date of enactment of this Act, the Judicial Conference of the United States shall submit a copy of the procedures prescribed under this subsection to the Committee on Government Reform and Oversight and the Committee on the Judiciary of the House of Representatives and the Committee on Governmental Affairs and the Committee on the Judiciary of the Senate.

(B) EFFECTIVE DATE.—The procedures prescribed under this subsection shall take effect 13 months after the date of enactment of this Act.

SEC. 5. VETERANS' PREFERENCE REQUIRED FOR REDUCTIONS IN FORCE IN THE FEDERAL AVIATION ADMINISTRATION.

Section 347(b) of the Department of Transportation and Related Agencies Appropriations Act, 1996 (109 Stat. 460) is amended—

(1) by striking "and" at the end of paragraph (6);

(2) by striking the period at the end of paragraph (7) and inserting "; and"; and

(3) by adding at the end the following:

"(8) sections 3501–3504, as such sections relate to veterans' preference.".

SEC. 6. FAILURE TO COMPLY WITH VETERANS' PREFERENCE REQUIREMENTS TO BE TREATED AS A PROHIBITED PERSONNEL PRACTICE FOR CERTAIN PURPOSES.

(a) IN GENERAL.—Subsection (b) of section 2302 of title 5,United States Code, is amended—

(1) by striking "or" at the end of paragraph (10);

(2) by redesignating paragraph (11) as paragraph (12); and

(3) by inserting after paragraph (10) the following:

"(11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

"(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action

would violate a veterans' preference requirement; or".

(b) DEFINITION; LIMITATION.—Section 2302 of title 5, United States Code, is amended by adding at the end the following:

"(e)(1) For the purpose of this section, the term 'veterans' preference requirement' means any of the following provisions of law:

"(A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701.

"(B) Sections 943(c)(2) and 1784(c) of title 10.

"(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act.

"(D) Section 301(c) of the Foreign Service Act of 1980.

"(E) Sections 106(f), 7281(e), and 7802(5) of title 38.

"(F) Section 1005(a) of title 39.

"(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations as being a veterans' preference requirement for the purposes of this subsection.

"(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

"(2) Notwithstanding any other provision of this title, no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11). Nothing in this paragraph shall be considered to

affect any authority under section 1215 (relating to disciplinary action).".

(c) REPEALS.—

(1) SECTION 1599c OF TITLE 10, UNITED STATES CODE.—

(A) REPEAL.—Section 1599c of title 10, United States Code, is repealed.

(B) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 81 of such title is amended by striking out the item relating to section 1599c.

(2) SECTION 2302(a)(1) OF TITLE 5, UNITED STATES CODE.— Subsection (a)(1) of section 2302 of title 5, United States Code, is amended to read as follows:

"(a)(1) For the purpose of this title, 'prohibited personnel practice' means any action described in subsection (b).".

(d) SAVINGS PROVISION.—This section shall be treated as if it had never been enacted for purposes of any personnel action (within the meaning of section 2302 of title 5, United States Code) preceding the date of enactment of this Act.

SEC. 7. EXPANSION AND IMPROVEMENT OF VETERANS' EMPLOYMENT EMPHASIS UNDER FEDERAL CONTRACTS.

(a) COVERED VETERANS.—Section 4212 of title 38, United States Code, is amended—

(1) in subsection (a)—

(A) by striking out "$10,000" and inserting in lieu thereof "$25,000"; and

(B) by striking out "special disabled veterans and veterans of the Vietnam era" and inserting in lieu

thereof "special disabled veterans, veterans of the Vietnam era, and any other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized";

(2) in subsection (b), by striking out "special disabled veteran or veteran of the Vietnam era" and inserting in lieu thereof "veteran covered by the first sentence of subsection (a)"; and

(3) in subsection (d)(1), by striking out "veterans of the Vietnam era or special disabled veterans" both places it appears and inserting in lieu thereof "special disabled veterans, veterans of the Vietnam era, or other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized".

(b) PROHIBITION ON CONTRACTING WITH ENTITIES NOT MEETING REPORTING REQUIREMENTS.—(1) Subchapter III of chapter 13 of title 31, United States Code, is amended by adding at the end the following:

"§ 1354. Limitation on use of appropriated funds for contracts with entities not meeting veterans' employment reporting requirements

"(a)(1) Subject to paragraph (2), no agency may obligate or expend funds appropriated for the agency for a fiscal year to enter into a contract described in section 4212(a) of title 38 with a contractor from which a report was required under section 4212(d) of that title with respect to the preceding fiscal year if such contractor did not submit such report.

"(2) Paragraph (1) shall cease to apply with respect to a contractor otherwise covered by that paragraph on the date on which the contractor submits the report required by such section 4212(d) for the fiscal year concerned.

"(b) The Secretary of Labor shall make available in a database a list of the contractors that have complied with the provisions of such section 4212(d).".

(2) The table of sections at the beginning of chapter 13 of such title is amended by adding at the end the following:

"1354. Limitation on use of appropriated funds for contracts with entities not meeting veterans' employment reporting requirements."

SEC. 8. REQUIREMENT FOR ADDITIONAL INFORMATION IN ANNUAL REPORTS FROM FEDERAL CONTRACTORS ON VETERANS EMPLOYMENT.

Section 4212(d)(1) of title 38, United States Code, as amended by section 7(a)(3) of this Act, is further amended—

(1) by striking out "and" at the end of subparagraph (A);

(2) by striking out the period at the end of subparagraph (B) and inserting in lieu thereof "; and"; and

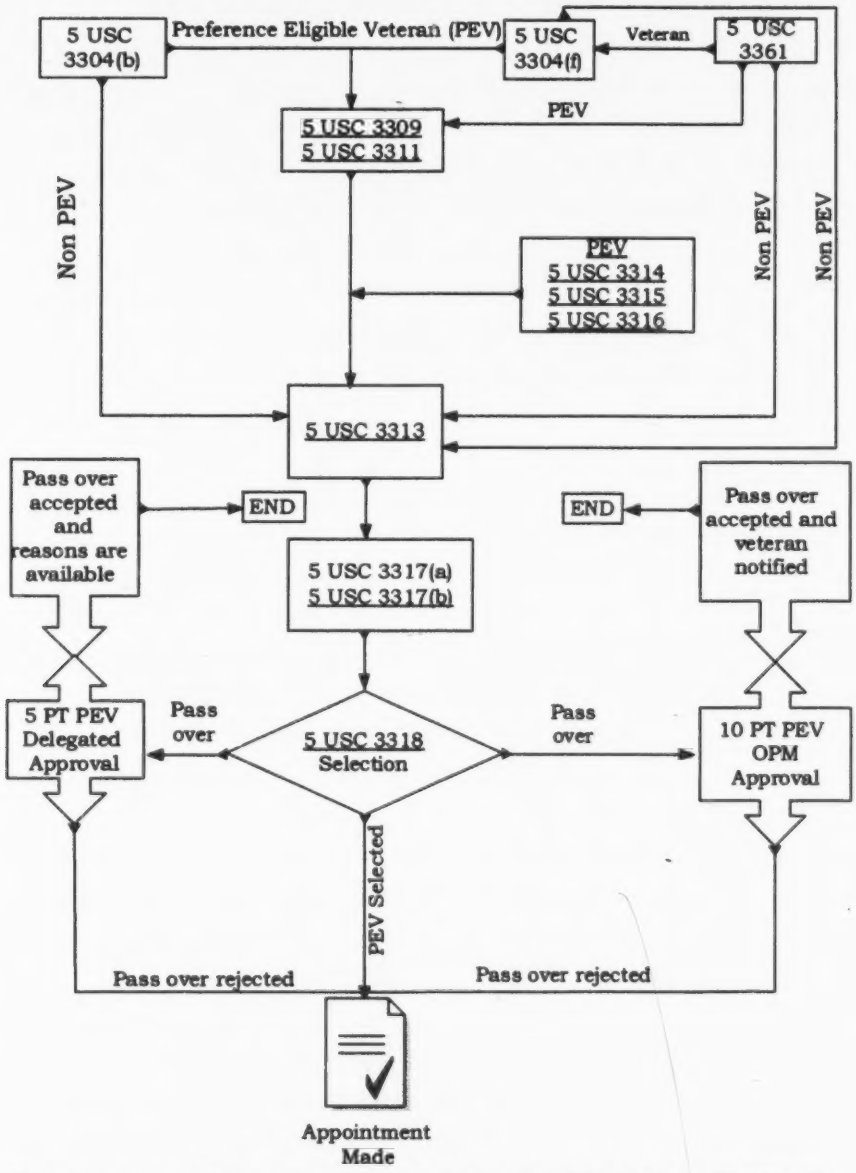
(3) by adding at the end of the following

"(C) the maximum number and the minimum number of employees of such contractor during the period covered by the report.".

Approved October 31, 1998.

LEGISLATIVE HISTORY—S. 1021 (H.R. 240):
HOUSE REPORTS: No. 105–40, Pt. 1 accompanying H.R. 240 (Comm. on Government Reform and Oversight).
SENATE REPORTS: No. 105–340 (Comm. on Veterans' Affairs).
CONGRESSIONAL RECORD, Vol. 144 (1998):
Oct. 5, considered and passed Senate.
Oct. 8, considered and passed House.

Statutes Relating to Veteran Preference



Veteran preference requirements listed in 5 USC 2302(b)(11)(B) are underlined